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# ADA Litigation Cannot Reasonably Accommodate *Per Se* Rules

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# ADA LITIGATION CANNOT REASONABLY ACCOMMODATE *PER SE* RULES

**Abstract:** On September 20, 2017, the U.S. Court of Appeals for the Seventh Circuit in *Severson v. Heartland Woodcraft, Inc.* held that an employee requesting a multi-month leave of absence is not a “qualified individual” employee under the Americans with Disabilities Act (ADA) and that such leave is therefore not a reasonable accommodation as defined by the ADA. In so doing, the court split from its sister circuits and made a bright-line rule that categorically excludes certain employees with disabilities from protection under the ADA. This Comment argues that the Seventh Circuit should have left more room for case by case inquiries into the specific circumstances of leave of absence requests to align with the underlying purposes of the ADA: providing individualized accommodations to employees with disabilities to ensure they have access to equal employment opportunities.

## INTRODUCTION

Under the Americans with Disabilities Act (the “ADA”), employers must provide accommodations to otherwise qualified employees with disabilities that will allow them to perform the essential functions of their jobs.<sup>1</sup> The ADA provides a non-exhaustive list of what constitutes a reasonable accommodation.<sup>2</sup> This leaves employers, employees, and the courts to determine what accommodations the law requires.<sup>3</sup>

In 2017, in *Severson v. Heartland Woodcraft, Inc.*, the U.S. Court of Appeals for the Seventh Circuit held that an individual requesting a multi-month leave of absence was not a “qualified individual” for his position and that such leave could never be a reasonable accommodation under the ADA.<sup>4</sup> This bright-line rule clarified what amount of leave employers must provide employees with disabilities.<sup>5</sup> This categorical ruling, however, left no room for

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<sup>1</sup> 42 U.S.C. §§ 12111(8), 12112(b)(5)(A) (2012).

<sup>2</sup> *Id.* § 12111(9); H.R. REP. NO. 101-485, pt. 2, at 62 (1990) (noting that the list of reasonable accommodations is meant to provide guidance as to what constitutes a reasonable accommodation but is not meant to be a complete list).

<sup>3</sup> See H.R. REP. NO. 101-485, pt. 2, at 62 (explaining that reasonable accommodations are to be determined on a case-by-case basis based on particular circumstances).

<sup>4</sup> *Severson v. Heartland Woodcraft, Inc.* (*Severson II*), 872 F.3d 476, 481 (7th Cir. 2017), cert. denied, 138 S. Ct. 1441 (2018); Alexandra Mitropoulos, *Leave Me Lonely: The Impact of Severson v. Heartland Woodcraft and Golden v. IHA on Leaves of Absence under the Americans with Disabilities Act*, 2018 EMERGING ISSUES 8604.

<sup>5</sup> *Recent Case: Employment Law—Extended Leave and the ADA—Seventh Circuit Rules That a Multimonth Leave of Absence Cannot be a Reasonable Accommodation*, 131 HARV. L. REV. 2463, 2467 (2018) [hereinafter *Recent Case: Employment Law*].

case by case inquiry into the specific circumstances of cases and went against both the purpose of the ADA and the recommendations of the Equal Employment Opportunity Commission (“EEOC”).<sup>6</sup> Furthermore, the Seventh Circuit split from its sister circuits that utilize factual inquiry when considering whether or not a leave of absence is a reasonable accommodation.<sup>7</sup>

Part I of this Comment develops the background of *Severson*, including the facts, the procedural history, and the legal context for ADA leave of absence jurisprudence.<sup>8</sup> Part II of this Comment discusses the purpose of the ADA, the circuit split over leave of absence as a reasonable accommodation, EEOC guidance on the issue, and the mixed responses to *Severson II*’s bright line ruling.<sup>9</sup> Part III of this Comment analyzes the Seventh Circuit’s misapplication of the ADA’s “qualified individual” standard and inappropriate use of a *per se* rule regarding leave of absence, concluding that the court should have left room for case by case inquiry when deciding whether or not a multi-month leave of absence can constitute a reasonable accommodation.<sup>10</sup>

## I. THE FACTUAL BACKGROUND AND PROCEDURAL HISTORY OF *SEVERSON*

In 2017, the Seventh Circuit in *Severson II* decided that a multi-month leave of absence was not a reasonable accommodation under the ADA.<sup>11</sup> Section A of this Part develops the facts of *Severson II*.<sup>12</sup> Section B of this Part discusses the procedural history of the case from its original filing in district court to the Supreme Court’s denial of a writ of certiorari.<sup>13</sup> Section C of this Part defines the ADA and discusses the state of the law regarding medical leave as a reasonable accommodation for disability prior to *Severson II*.<sup>14</sup>

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<sup>6</sup> See *Golden v. Indianapolis Hous. Agency*, 698 F. App’x 835, 837 (7th Cir. 2017) (Rovner, J., concurring) (stating that the ADA is meant to be flexible and is not the place for *per se* rules); Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* in Support of Plaintiff-Appellant and Reversal at 18, *Severson II*, 872 F.3d 476 (2017) (No. 15-3754), 2016 WL 1085869, at \*18 [hereinafter Brief of the EEOC] (positing that a *per se* exclusion of leave as a possible reasonable accommodation goes against the purpose of the ADA).

<sup>7</sup> See *Severson II*, 872 F.3d at 481 (holding that a multi-month leave of absence can never be a reasonable accommodation); see, e.g., *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999) (holding that what constitutes a reasonable accommodation requires a fact-specific inquiry, and that extended leave may qualify in certain circumstances).

<sup>8</sup> See *infra* notes 11–51 and accompanying text.

<sup>9</sup> See *infra* notes 52–81 and accompanying text.

<sup>10</sup> See *infra* notes 82–102 and accompanying text.

<sup>11</sup> *Severson II*, 872 F.3d at 481.

<sup>12</sup> See *infra* notes 15–26 and accompanying text.

<sup>13</sup> See *infra* notes 27–31 and accompanying text.

<sup>14</sup> See *infra* notes 32–51 and accompanying text.

*A. Raymond Severson's Injury and Resulting Loss of Employment*

Plaintiff Raymond Severson had suffered from back issues since 2005 and began working for the defendant, Heartland Woodcraft, Inc. ("Heartland"), in 2006.<sup>15</sup> Severson was promoted from supervisor to shop superintendent and finally to operations manager.<sup>16</sup> On June 5, 2013, Severson strained his back before coming into work, worsening his preexisting condition.<sup>17</sup> In a meeting at work that same day, Heartland's president and general manager informed Severson that he was being demoted to a second-shift "lead" position.<sup>18</sup> After Severson mentioned that he was experiencing back pain, Heartland's president suggested that Severson leave work for the day.<sup>19</sup>

Beginning on June 10, Severson submitted his doctor's notes to Heartland indicating that he would be unable to work due to his back pain.<sup>20</sup> In early July, Severson notified Heartland that he was retroactively exercising his right to take a leave of absence under the Family and Medical Leave Act (the "FMLA") as of June 5, 2013.<sup>21</sup> On August 13, Severson called Heartland's human resources manager and explained that he would be having back surgery on August 27, the same day his maximum 12-week FMLA leave would expire, and requested an extension of his medical leave.<sup>22</sup> On August 26, Heartland informed Severson that his employment would end when his

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<sup>15</sup> *Severson II*, 872 F.3d at 479; *Severson v. Heartland Woodcraft, Inc. (Severson I)*, 2015 WL 7113390, at \*1 (E.D. Wis. Nov. 12, 2015), *aff'd*, *Severson II*, 872 F.3d 476, *cert. denied*, 138 S. Ct. 1441. Severson was diagnosed in 2010 with back myelopathy, a compression of the spinal cord. *Severson II*, 872 F.3d at 479. He occasionally experienced flare-ups of his back pain that made it difficult for him to work at Heartland, a company that produces fixtures used by retail stores to display goods. *Id.*; *Severson I*, 2015 WL 7113390, at \*1.

<sup>16</sup> *Severson II*, 872 F.3d at 479.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*; *Severson I*, 2015 WL 7113390, at \*1. The job description stated that an employee in the lead position "performs manual labor in the production area of the plant, operates and troubleshoots production machinery, performs minor repairs as necessary, maintains the building, and frequently lifts materials and product weighing fifty pounds or more." *Severson II*, 872 F.3d at 479. The second-shift lead is described as a "working lead" position, meaning that the person holding the job has general managerial duties but also must assist subordinates with manufacturing tasks, including staging production projects that may involve lifting items weighing between thirty and fifty pounds. *Severson I*, 2015 WL 7113390, at \*5.

<sup>19</sup> *Severson I*, 2015 WL 7113390, at \*1. Severson accepted the job as second-shift lead but never worked in his new assignment due to subsequently requesting leave for back surgery and ultimately losing his job. *Severson II*, 872 F.3d at 479.

<sup>20</sup> *Severson I*, 2015 WL 7113390, at \*1. The notes indicated that Severson was suffering from multiple herniated and bulging disks in his lumbar spine and was unable to work until further notice. *Severson II*, 872 F.3d at 479. He was in frequent contact with Heartland's general manager and human resources manager during this time. *Id.*

<sup>21</sup> *Severson I*, 2015 WL 7113390, at \*1.

<sup>22</sup> *Severson II*, 872 F.3d at 479. The expected recovery time for such a surgery was at minimum two months. *Id.* Severson also informed Heartland that there was a possibility he would need a second surgery that would require an additional month of leave. *Severson I*, 2015 WL 7113390, at \*2.

FMLA leave expired and invited him to reapply to the company when he was medically cleared to work again.<sup>23</sup>

Severson underwent back surgery on August 27.<sup>24</sup> On October 17 his doctor gave him partial clearance to return to work with a 20-pound lifting restriction, and on December 5 cleared him to return to work without limitation.<sup>25</sup> Instead of reapplying for work at Heartland, Severson sued the company.<sup>26</sup>

### B. Severson Moves Through the Courts

In his original complaint with the District Court for the Eastern District of Wisconsin, Severson alleged that Heartland failed to reasonably accommodate his back injury and therefore his termination constituted discrimination in violation of the ADA.<sup>27</sup> Heartland moved for summary judgment on

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<sup>23</sup> *Severson II*, 872 F.3d at 479–80. The human-resources manager presented Severson’s request for extended leave to the president of Heartland, who decided that Heartland could not extend Severson’s leave of absence. *Severson I*, 2015 WL 7113390, at \*2. He made this decision because the current second-shift lead was not performing well and therefore Heartland could not continue to keep the position open for Severson. *Id.* The president stated that he considered hiring a temporary replacement but decided not to because of the difficulty in finding and training a qualified candidate to fill the position temporarily. *Id.* Severson was informed of this decision by phone and follow-up letter. *Id.*

<sup>24</sup> *Severson II*, 872 F.3d at 480.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Severson I*, 2015 WL 7113390, at \*2. Severson proposed three accommodations that the company could have offered him: “(1) a two- or three-month leave of absence; (2) a transfer to a vacant job; or (3) a temporary light-duty position with no heavy lifting.” *Severson II*, 872 F.3d at 480. Severson also alleged that Heartland intentionally interfered with his rights under the FMLA and terminated him in retaliation for exercising those rights. *Severson I*, 2015 WL 7113390, at \*2. Heartland’s counsel drafted a motion for sanctions for violation of FED. R. CIV. P. 11(b) (“Rule 11 sanctions”), arguing that Severson’s FMLA claims lacked reasonable evidentiary and legal support. *Severson I*, 2015 WL 7113390, at \*2; see FED. R. CIV. P. 11(b) (creating representations to the court made when individuals present pleadings, motions, or other papers to the court); *Id.* R. 11(c) (creating sanctions for individuals who violate FED. R. CIV. P. 11(b)). Heartland also argued that several of Severson’s factual allegations lacked evidentiary support, including the allegation that he could have returned to work “immediately” after surgery and that he had informed Heartland of this fact. *Severson I*, 2015 WL 7113390, at \*2. By letter, Severson agreed to withdraw these allegations and his FMLA interference claim. *Id.* at \*3. Heartland’s counsel did not respond to this letter, and Severson did not file any notice with the court withdrawing the claims. *Id.* A few weeks before the close of discovery, Heartland filed a motion for summary judgment on the FMLA claims and a motion for Rule 11 sanctions. *Id.* Severson’s counsel sent Heartland’s counsel an email reminding him that Severson had agreed to withdraw the allegations that he could have returned to work immediately and his claim for FMLA interference. *Id.* Heartland’s counsel refused to stipulate to the agreement for dismissal with prejudice unless Severson agreed that dismissal would not prevent Heartland from pursuing Rule 11 sanctions, which Severson would not agree to. *Id.* Severson filed a motion to amend his complaint to withdraw the FMLA claims that the district court granted. *Id.* at \*3, \*12. The district court also denied Heartland’s motion for summary judgment on the FMLA claims and motion for Rule 11 sanctions. *Id.* at \*12.

the basis that Severson's proposed accommodations were not reasonable under the ADA.<sup>28</sup> The district court agreed and granted the motion for summary judgment.<sup>29</sup> On appeal, the Seventh Circuit upheld the decision on the grounds that a multi-month leave of absence is unreasonable and an employee requiring such leave is not protected by the ADA.<sup>30</sup> The Supreme Court denied Severson's petition for writ of certiorari on April 2, 2018.<sup>31</sup>

### *C. Legal Context and State of the Law Regarding Reasonable Accommodations*

Title I of the ADA provides that an employer shall not discriminate against a "qualified individual" on the basis of disability.<sup>32</sup> A qualified individual is an employee who can perform the "essential functions" of their position with or without accommodations from their employer.<sup>33</sup> Employees have the burden of proving that they were qualified individuals at the time of an adverse employment action.<sup>34</sup>

Under the ADA, discrimination includes failure to make reasonable accommodations for the disabilities of an "otherwise qualified" employee that are known to the employer unless the employer can demonstrate that the accommodation would be unduly burdensome.<sup>35</sup> The ADA includes a list of

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<sup>28</sup> *Severson I*, 2015 WL 7113390, at \*2; see 42 U.S.C. § 12112(b)(5)(B) (stating that failure to make reasonable accommodations for employees with disabilities, absent a showing that such an accommodation would impose an undue burden on the employer, constitutes illegal discrimination).

<sup>29</sup> *Severson I*, 2015 WL 7113390, at \*11.

<sup>30</sup> *Severson II*, 872 F.3d at 479.

<sup>31</sup> *Severson v. Heartland Woodcraft, Inc.*, 138 S. Ct. 1441 (2018).

<sup>32</sup> 42 U.S.C. § 12112(a).

<sup>33</sup> *Id.* § 12111(8) ("the term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the job"). Under § 12111(8), an employer's judgment as to which job functions are essential is considered when determining whether an employee is a qualified individual. *Id.* The Seventh Circuit Court of Appeals applies a two-step test to determine whether an individual is qualified, looking first at whether the individual has the proper prerequisites for the position and second at whether the individual can perform the essential functions of the position with or without reasonable accommodations. *Stern v. St. Anthony's Health Ctr.*, 788 F.3d 276, 285 (7th Cir. 2015). The "qualified individual" test and related "essential functions" requirement are important particularly in cases like *Severson II*, where the defendant argues that attendance is an essential function of the job. E. Pierce Blue, *Job Functions, Standards, and Accommodations Under the ADA: Recent EEOC Decisions*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 19, 23 (2015). Once an "essential function" argument like this is accepted, the employer is no longer required to consider accommodations because the employee is not "qualified" and therefore not protected by the ADA. *Id.*

<sup>34</sup> *Severson I*, 2015 WL 7113390, at \*3.

<sup>35</sup> 42 U.S.C. § 12112(b)(5). To determine whether an accommodation would result in "undue hardship," an employer may consider whether the accommodation will impose significant difficulty or expense given factors such as the nature and cost of the accommodation, the overall financial resources of the employer, and more. *Id.* § 12111(10).

what *may* constitute a reasonable accommodation but does not elaborate on what it *must* include.<sup>36</sup> Nevertheless, the “baseline requirement” is that a reasonable accommodation is one that allows a qualified employee with a disability to perform the essential functions of the job.<sup>37</sup>

In 2002, in *U.S. Airways Inc. v. Barnett*, the Supreme Court provided some clarification of what constitutes a reasonable accommodation.<sup>38</sup> The plaintiff in *Barnett* injured his back while on the job and was temporarily transferred to a less physically demanding position in the mailroom.<sup>39</sup> He asked his employer to make an exception to its seniority system to allow him to remain in the mailroom position to accommodate his continued limitations, but was refused and ultimately fired.<sup>40</sup> He sued his employer for violating the ADA in refusing to provide the reasonable accommodation of permitting him to continue working in the mailroom.<sup>41</sup>

The Court utilized a two-step framework to reach its conclusion that violating the rules of a seniority system to reassign an employee with a disability to a different position is not a reasonable accommodation.<sup>42</sup> First, the Court engaged in a general inquiry into whether or not the proposed accommodation seemed reasonable on its face, as shown in practice or in precedent and concluded that it was not.<sup>43</sup> Second, the Court explained that the plaintiff could overcome the presumption of unreasonableness if they can show “spe-

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<sup>36</sup> See *id.* § 12111(9) (emphasis added) (providing numerous examples of potential accommodations, including “other similar accommodations for individuals with disabilities”). A reasonable accommodation may include “making existing facilities accessible to individuals with disabilities . . . job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquiring or modifying equipment or devices, adjusting or modifying examinations, training materials, or policies, providing qualified readers or interpreters.” *Id.* This list shows that the concept of “reasonable accommodation” is flexible and is meant to contain examples of measures that facilitate successful employment, but is not meant to be dispositive. *Severson II*, 872 F.3d at 481 (citing 42 U.S.C. § 12111(9)); H.R. REP. NO. 101-485, pt. 2 at 62.

<sup>37</sup> *Severson II*, 872 F.3d at 481 (citing 42 U.S.C. § 12111(8)). The EEOC regulations define a reasonable accommodation as “any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunity.” Blue, *supra* note 33, at 22 (quoting 29 C.F.R. app. § 1630.2(o) (2015)).

<sup>38</sup> *Recent Case: Employment Law*, *supra* note 5, at 2467; see *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 393 (2002) (examining whether a disabled work’s request for a “reasonable accommodation” trumps the employer’s established seniority system).

<sup>39</sup> *Barnett*, 535 U.S. at 394.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 394–95. The plaintiff’s arguments were specifically that he was an “individual with a disability,” that assignment to the mailroom position was a reasonable accommodation, and that refusal to provide that accommodation constituted unlawful discrimination. *Id.*

<sup>42</sup> *Id.* at 401–02, 405.

<sup>43</sup> *Id.* at 403–04.

cial circumstances” for which the accommodation can be reasonable even though it is not ordinarily.<sup>44</sup>

Despite this guidance from the Supreme Court, *Severson II* falls within a long line of cases in which circuit courts struggle to determine whether or not extended medical leave constitutes a reasonable accommodation under the ADA.<sup>45</sup> Long-term medical leave is typically covered by the FMLA, which entitles employees up to 12 weeks of medical leave during any 12-month period because of a serious health condition.<sup>46</sup> Due to the time constraints of the FMLA, cases like *Severson II* arise when employees request further medical leave as a reasonable accommodation under the ADA.<sup>47</sup>

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<sup>44</sup> *Recent Case: Employment Law*, *supra* note 5, at 2468; see *Barnett*, 535 U.S. at 405 (“[T]he plaintiff . . . nonetheless remains free to show that special circumstances warrant a finding that, despite the presence of a seniority system (which the ADA may not trump in the run of cases), the requested accommodation is reasonable on the particular facts.”). For example, the plaintiff might show that the system in question already contains exceptions, such that one further exception is unlikely to matter and constitutes a reasonable accommodation in the particular case. *Barnett*, 535 U.S. at 405. In 2002, in *U.S. Airways, Inc. v. Barnett*, the Supreme Court ultimately held that it is presumptively unreasonable for an employer to violate an established seniority system to accommodate an employee with disabilities, but remanded the case to the Eighth Circuit Court of Appeals to determine whether the accommodation was reasonable under the particular facts and circumstances of the case. *Id.* at 406; Michael Creta, Note, *The Accommodation of Last Resort: The Americans with Disabilities Act and Reassignments*, 55 B.C. L. REV. 1693, 1708 (2014).

<sup>45</sup> See *Recent Case: Employment Law*, *supra* note 5, at 2463 (describing how leave of absence cases are some of the “murkiest waters” of ADA litigation, with *Severson II* representing a split from other circuits on the issue); see, e.g., *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 123, 127 (1st Cir. 2017) (deciding whether employer’s denial of plaintiff’s request for a year-long leave of absence for depression and anxiety constituted discrimination under the ADA); *Cleveland v. Fed. Express Corp.*, 83 F. App’x 74, 76, 79 (6th Cir. 2003) (deciding whether it was a violation of the ADA for an employer to reject the six month leave request of a pregnant employee with lupus).

<sup>46</sup> Family and Medical Leave Act of 1993 (FMLA) § 102(a)(1), 29 U.S.C. § 2612(a)(1) (2012). An eligible employee under FMLA is one who has been employed for at least twelve months and has contributed at least 1,250 hours of service to that employer. *Id.* § 2611(2)(A). The employer must employ at least fifty employees. *Id.* § 2611(B)(ii). This presents the interesting case where an employee who has been employed for only one week may be entitled to a leave of absence under the ADA but an employee with the same condition who has been employed for eleven months may not be entitled to the same leave of absence under FMLA. Allison Oasis Kahn, *Navigating the Circuit Split Over Reasonable ADA Leave*, LAW360 (Apr. 12, 2018, 11:22 AM), <https://www.law360.com/employment/articles/1031303/navigating-the-circuit-split-over-reasonable-ada-leave> [https://perma.cc/FNU5-TSTE]; see 29 U.S.C. § 2611(2)(A) (defining an eligible employee as one who has worked for the employer for at least one year); 42 U.S.C. § 12111(5)(A) (defining an eligible employee as any employed individual). The FMLA defines a “serious health condition” as an illness, injury, impairment, or physical or medical condition that involves inpatient care or continuing treatment by a health care provider. 29 U.S.C. § 2611(11). The ADA defines “disability” as an individual with a physical or mental impairment that substantially limits one or more major life activity of such individual. 42 U.S.C. § 12102(1)(A). Individuals can therefore have conditions that qualify as both a “serious health impairment” and a “disability,” such as *Severson*’s back injury. 29 U.S.C. § 2611(11); 42 U.S.C. § 12102(1)(A).

<sup>47</sup> See *Severson II*, 872 F.3d at 478 (arising out of *Severson*’s request for an extension of FMLA leave as a reasonable accommodation due to his requiring surgery and recovery time).



Although courts agree that some amount of leave can constitute a reasonable accommodation in some circumstances, they have primarily relied on fact-specific inquiries to determine just what those circumstances are.<sup>48</sup> Although the Court in *Barnett* held that ordinarily, altering a seniority system is not a reasonable accommodation, the plaintiff still had an opportunity to show that his particular circumstances warranted a finding of reasonableness.<sup>49</sup> The Seventh Circuit in *Severson II* broke from the other circuits in holding that a multi-month leave of absence is *per se* unreasonable.<sup>50</sup> In so deciding, the court also held that a plaintiff requesting a multi-month leave of absence is not a “qualified individual” who can perform the essential functions of their job.<sup>51</sup>

## II. REASONING FOR AND RESPONSES TO REASONABLE ACCOMMODATION LITIGATION

The question of what constitutes a reasonable accommodation is one of the ADA’s most convoluted issues of the ADA, and extended leaves of absence are one of the most highly contested potential accommodations.<sup>52</sup> Section A of this Part discusses the legislative intent behind the ADA and the critical need for the provision of reasonable accommodations.<sup>53</sup> Section B of this Part discusses the current circuit split on requests for multi-month leave of

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<sup>48</sup> See, e.g., *Echevarria*, 856 F.3d at 128 (quoting *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647 (1st Cir. 2000)) (“[W]hether a leave request is reasonable turns on the facts of the case.”).

<sup>49</sup> *Barnett*, 535 U.S. at 405. The court left room for this factual inquiry because, although an accommodation might be unreasonable for most employers in the industry, it might nevertheless be required of the employer given particular facts, such as if the employer frequently altered its seniority system practices. *Id.* (citing *Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 137 (2d Cir. 1995)).

<sup>50</sup> *Mitropoulos*, *supra* note 4. A few weeks after *Severson II*, the Seventh Circuit reaffirmed its position, holding in a second case, *Golden v. Indianapolis Housing Agency*, that, pursuant to *Severson II*, an individual who requests six months’ additional medical leave is not a qualified individual under the ADA and therefore providing such leave is not a reasonable accommodation. *Golden v. Indianapolis Hous. Agency*, 698 F. App’x 835, 837 (7th Cir. 2017) (citing *Severson II*, 872 F.3d at 478–79).

<sup>51</sup> *Severson II*, 872 F.3d at 481. The Tenth Circuit Court of Appeals in 2014, in *Hwang v. Kansas State University*, also stated that an employee who cannot come to work cannot perform the essential functions of the job, holding that a six month leave of absence is not a reasonable accommodation under Section 504 of the Rehabilitation Act. 753 F.3d 1159, 1161 (10th Cir. 2014). The court stated, however, that when it comes to whether employers are required to offer six months or more of leave, the answer is “almost always no.” *Id.* (emphasis added). The Tenth Circuit cited *Barnett* in stating that whether a leave request is reasonable will depend on “the duties essential to the job in question, the nature and length of the leave sought, and the impact on fellow employees” and stated there may be circumstances in which lengthy leave is more reasonable than in others. *Id.* at 1162.

<sup>52</sup> *Recent Case: Employment Law*, *supra* note 5, at 2467 (“if the Americans with Disabilities Act is a ‘swamp of imprecise language,’ then leave-of-absence disputes are fought in its murkiest waters”).

<sup>53</sup> See *infra* notes 57–61 and accompanying text.

absences as a reasonable accommodation under the ADA.<sup>54</sup> Section C of this Part summarizes guidance from the Equal Employment Opportunity Commission (the “EEOC”) on the issue of leaves of absence.<sup>55</sup> Section D of this Part summarizes responses to the Seventh Circuit Court of Appeals’ holding.<sup>56</sup>

### *A. Legislative Intent Behind the ADA*

The purpose of the ADA is to rectify the discrimination and disadvantages individuals with disabilities face socially, vocationally, economically, and educationally.<sup>57</sup> In enacting the ADA, Congress incorporated many of the requirements of the Rehabilitation Act of 1973, a civil rights law that prohibits discrimination against individuals with disabilities.<sup>58</sup> The provision of reasonable accommodations is a key mandate of the Rehabilitation Act, and legislative history reveals that Congress intended the same to be so for the ADA.<sup>59</sup> When enacting the law in 1990, Congress asserted that accommodations should address individual needs and rejected amendments that established *per se* rules.<sup>60</sup> The ADA requires employers to be flexible and alter standard practices to accommodate employees with disabilities.<sup>61</sup>

### *B. Circuit Split on Extended Medical Leave as a Reasonable Accommodation*

Rather than employing the ADA’s inherent flexibility, the Seventh Circuit in 2017, in *Severson v. Heartland Woodcraft, Inc. (Severson II)*, held that a multi-month leave of absence is *per se* never a reasonable accommoda-

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<sup>54</sup> See *infra* notes 62–76 and accompanying text.

<sup>55</sup> See *infra* notes 67–76 and accompanying text.

<sup>56</sup> See *infra* notes 77–81 and accompanying text.

<sup>57</sup> 42 U.S.C. § 12101(a) (2012). The discrimination facing individuals with disabilities includes both “outright intentional exclusion” and “failure to make modifications to existing facilities and practices.” *Id.*

<sup>58</sup> See H.R. REP. NO. 101-485, pt. 2, at 23 (1990) (stating that the ADA incorporates many of the standards of the Rehabilitation Act and giving the reasonable accommodation requirement as a specific example); 29 U.S.C. § 794(a) (2012) (prohibiting discrimination against individuals with disabilities by any agency that receives federal funding).

<sup>59</sup> H.R. REP. NO. 101-485, pt. 2, at 33; see 10 C.F.R. § 4.123 (defining reasonable accommodations under the Rehabilitation Act). The House Committee on Education and Labor highlighted that testimony before the Committee indicated that provision of reasonable accommodations was critical to accomplishing the purpose of the ADA in allowing individuals with disabilities to participate in the “economic mainstream” of society. H.R. REP. NO. 101-485, pt. 2, at 34.

<sup>60</sup> H.R. REP. NO. 101-485, pt. 3, at 39, 41. For example, Congress rejected an amendment that would define undue hardship as costing more than 10% of the disabled employee’s salary. *Id.* at 41.

<sup>61</sup> Blue, *supra* note 33, at 19. Even the language of the EEOC regulations for implementation of the ADA indicate a requirement of flexibility in stating that employers may be required to *modify* or *adjust* the way things are *customarily* done. 29 C.F.R. § 1630.2(o)(ii) (2015); Blue, *supra* note 33, at 22.

tion.<sup>62</sup> The decision affirmed the Seventh Circuit's 2003 holding in *Byrne v. Avon Products, Inc.* that an employee unable to work cannot perform their job's essential functions and therefore is not a qualified individual entitled to protection under the ADA.<sup>63</sup>

Almost every other circuit has decided ADA leave of absence cases by engaging in a factual inquiry into whether the leave of absence would allow an employee to perform the essential functions of the job, is "facially reasonable," and would not place an undue burden on the employer.<sup>64</sup> Many of these cases have still resulted in the requested leave being found unreasonable, but only *given the circumstances* of the employer, employee, and the leave in question.<sup>65</sup> This line of reasoning leaves open the possibility that a multi-

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<sup>62</sup> See *Severson v. Heartland Woodcraft, Inc. (Severson II)*, 872 F.3d 476, 479 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018) (holding that a multi-month leave of absence is categorically outside the scope of what constitutes a reasonable accommodation); Blue, *supra* note 33, at 19 ("what the Americans with Disabilities Act requires on employers, in one word, is flexibility").

<sup>63</sup> *Severson II*, 872 F.3d at 481 (citing *Byrne v. Avon Prods., Inc.*, 328 F.3d 379, 381 (7th Cir. 2003)). The court stated that allowing a multi-month leave of absence to constitute a reasonable accommodation would excuse the inability to work rather than allow the employee to perform the duties of the job. *Severson II*, 872 F.3d at 481.

<sup>64</sup> See *Kieffer v. CPR Restoration & Cleaning Servs.*, 733 F. App'x 632, 637–38 (3d Cir. 2018) (holding that the leave *requested here* was indefinite and therefore not a reasonable accommodation that would enable the employee to perform his essential job function) (emphasis added); *Wenc v. New London Bd. of Educ.*, 702 F. App'x 27, 29 (2d Cir. 2017) (reaffirming that the reasonableness of an employer's accommodation is a fact-specific question to be resolved by a fact-finder); *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 132–33 (1st Cir. 2017) (citing *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 648 (1st Cir. 2000)) (holding that an employee is required to show that the proposed accommodation would enable her to perform the essential functions of her job and that it is feasible for the employer *under the circumstances*); *Moss v. Harris Cnty. Constable Precinct One*, 851 F.3d 413, 418, 419 (5th Cir. 2017) (holding that, although time off can be a reasonable accommodation, the employer was not required to provide leave to a disabled employee who did not provide a specified date to return to work); *Santandreu v. Miami Dade Cty.*, 513 F. App'x 902, 905–06 (11th Cir. 2013) (because employee was unable to indicate when he would return to work, additional leave was not a reasonable accommodation despite the fact that in some cases it could be); *Cleveland v. Fed. Express Corp.*, 83 F. App'x 74, 78–79, 81 (6th Cir. 2003) (specifically declining to adopt a bright-line rule for what amount of leave can constitute a reasonable accommodation and holding that summary judgment was inappropriate in determining six months' leave was unreasonable given the circumstances).

<sup>65</sup> See, e.g., *Echevarria*, 856 F.3d at 132–33 (holding that whether a leave request is reasonable is a fact-specific inquiry and that the plaintiff was not able to meet her burden of showing her request was reasonable given her circumstances). In 2017, in *Echevarria v. AstraZeneca Pharmaceuticals LP*, the First Circuit Court of Appeals held that the plaintiff employee continued to extend her medical leave for five months while being treated for depression and ultimately requested an additional twelve months before being terminated from her position. *Id.* at 123–26. The court considered the length of the leave, the amount of leave already provided, the lack of medical documentation provided to the employer, and the employer's typical practices when it comes to leave. *Id.* at 129–31. The court ultimately stated that the employee failed to show that her requested leave was facially reasonable in either the circumstances of her case or in the run of cases. *Id.* at 128. The court specifically declined, however, to state that the same amount of leave would be unreasonable in every case, limiting the decision to the facts of the case at hand. *Id.* at 132–33.

month leave of absence *can* constitute a reasonable accommodation under some circumstances and requires a fact-specific inquiry.<sup>66</sup>

### C. EEOC Guidance on Leaves of Absence

Congress tasked the EEOC with interpreting, administering, and enforcing the ADA.<sup>67</sup> The EEOC has addressed granting leave as a reasonable accommodation and stated that providing medical leave that enables the employee to return to work once the leave has ended is a reasonable accommodation.<sup>68</sup>

In its brief as *amicus curiae* on behalf of Severson, the EEOC argued that the district court should have considered whether Severson could perform the essential functions of his job as of the date of his projected return to work.<sup>69</sup> The EEOC's position was that accommodation of a leave of absence is only fully achieved at the end of the leave period, so the relevant inquiry should have been whether, *at the end of the leave*, Severson would be able to perform the essential functions of his job.<sup>70</sup>

Applying the Supreme Court's reasoning from its 2002 decision in *U.S. Airways, Inc. v. Barnett*, the EEOC further argued that medical leave is a "facially feasible" accommodation under the ADA.<sup>71</sup> Although not every request for leave will be reasonable, the EEOC reasoned that Severson's request was time limited, definite, requested in advance, and that he would likely be able to go back to performing his regular duties upon his return.<sup>72</sup> The EEOC concluded that the evidence was sufficient for a jury to find that Severson's re-

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<sup>66</sup> See, e.g., *Cehrs v. Ne. Ohio Alzheimer's Research Ctr.*, 155 F.3d 775, 782, 783 (6th Cir. 1998) (stressing the need for individualization under the ADA in holding that there should be no presumption that uninterrupted attendance is always an essential job requirement nor that *per se* rules should dictate that lengthy or even indefinite leave can never constitute a reasonable accommodation).

<sup>67</sup> 42 U.S.C. §§ 12111(1); 12117(a).

<sup>68</sup> U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EMPLOYER-PROVIDED LEAVE AND THE AMERICANS WITH DISABILITIES ACT 2 (2016), <https://www.eeoc.gov/eeoc/publications/upload/ada-leave.pdf> [<https://perma.cc/3N2A-UB2G>].

<sup>69</sup> Brief of the EEOC, *supra* note 6, at 10.

<sup>70</sup> *Id.* at 11–12. The EEOC cautioned that any other interpretation would necessitate a finding that "no employee who was forced by disability to take medical leave could *ever* be a qualified individual under the ADA." *Id.* at 12 (quoting *Donelson v. Providence Health & Servs.*, 823 F. Supp. 2d 1179, 1189–90 (E.D. Wash. 2011)). Such an approach would be inconsistent with the EEOC's longstanding understanding of the ADA as including leave as a reasonable accommodation. *Id.* at 14. Furthermore, finding that an employee requesting a leave of absence is never a qualified individual would preclude the court from ever considering the reasonableness of a specific leave request. *Id.* at 18.

<sup>71</sup> *Id.* at 21 ("[L]eave generally is reasonable where it is of definite, time-limited duration, requested in advance, and likely to enable the employee to perform the essential job functions when he or she returns.").

<sup>72</sup> *Id.* at 21–22.

quest for extended leave was a facially reasonable accommodation and he was therefore a qualified individual entitled to protection under the ADA.<sup>73</sup>

The Seventh Circuit rejected the EEOC's reasoning as mistakenly equating a reasonable accommodation with an effective accommodation.<sup>74</sup> The court reasoned that just because a long-term medical leave might effectively allow an employee to return to work at its conclusion does not mean it is a reasonable accommodation that will allow the employee to perform the essential functions of his job.<sup>75</sup> The court held that such long-term medical leave should be left to the FMLA, reasoning that to follow the EEOC's recommendation would be to turn the ADA into a medical-leave statute.<sup>76</sup>

#### *D. Responses to the Seventh Circuit's Per Se Rule*

The *Severson II* categorical ruling has been praised as a "holy grail" for employers that provides clear guidelines for extended leave requests.<sup>77</sup> Employers now have a predictable answer and easily applicable rule when it comes to whether or not they are obligated to provide multi-month leaves of absence under the ADA.<sup>78</sup>

Others criticize the lack of flexibility inherent in such a *per se*, categorical ruling that a multi-month leave of absence can never be a reasonable accommodation.<sup>79</sup> In his concurring opinion in *Golden v. Indianapolis Housing Agency*, decided only a few weeks after *Severson II*, Judge Rovner of the Seventh Circuit wrote that a *per se* rule that applies without consideration of whether the leave would cause any hardship to the employer is "nonsensical."<sup>80</sup> According to Judge Rovner, the purpose of the ADA is to be flexible

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<sup>73</sup> *Id.* at 27. There would still be an opportunity for Heartland to prove that the requested accommodation, though reasonable, would create an undue hardship, though the EEOC argues there was not enough evidence to compel a jury finding that extending *Severson's* medical leave would inevitably have imposed an undue hardship. *Id.* at 30. They cited factual evidence that Heartland replaced *Severson* three months after firing him and only ten days before he was fully cleared to return to work. *Id.* at 29.

<sup>74</sup> *Severson II*, 872 F.3d at 482.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* The court distinguished the two laws by stating that the FMLA protected employees who sometimes would be unable to perform their job, whereas the ADA "applies only to those who can do the job." *Id.* at 481 (quoting *Byrne*, 382 F.3d at 381).

<sup>77</sup> *Recent Case: Employment Law*, *supra* note 5, at 2466; Patrick Dorrian, *Employers Get 'Holy Grail' Ruling on Leave as Job Accommodation*, BLOOMBERG LAW (Sept. 26, 2017 **Error! Hyperlink reference not valid.**), <https://www.bna.com/employers-holy-grail-n73014470108/> [<https://perma.cc/X6FC-QGBT>].

<sup>78</sup> *See Recent Case: Employment Law*, *supra* note 5, at 2466–67 (stating that those in favor of the *Severson II* ruling have lauded "its imposition of clear boundaries in an area of law marked by unpredictability.").

<sup>79</sup> *Id.* at 2467.

<sup>80</sup> *Golden v. Indianapolis Hous. Agency*, 698 Fed. App'x 835, 837 (7th Cir. 2017) (Rovner, J., concurring).

and individualized, and analyzing what length of leave is reasonable should involve inquiry into the unique circumstances of the employee, the requested accommodation, and the burden to the employer.<sup>81</sup>

### III. THE REAL SEVENTH CIRCUIT SPLIT: DEPARTURE FROM THE PURPOSE AND INTERPRETATION OF THE ADA

The Seventh Circuit Court of Appeals' *per se* rule from its 2017 opinion in *Severson v. Heartland Woodcraft, Inc.* (*Severson II*) is out of line with the ADA's goal of providing individualized accommodations that allow employees with disabilities to access equal employment opportunities.<sup>82</sup> Section A of this Part posits that the Seventh Circuit mischaracterized *Severson* as an unqualified employee under the ADA by analyzing whether he could perform the essential duties of his job while out on leave, not as of when he could return to work.<sup>83</sup> Section B of this Part argues that the Seventh Circuit contravened the purpose of the ADA in creating a *per se* rule that a multi-month leave of absence is never a reasonable accommodation because it left no room for the flexible, case-by-case inquiry inherent in ADA determinations.<sup>84</sup>

#### *A. An Employee Can Request Extended Leave and Be a "Qualified Individual" Too*

The Seventh Circuit made a categorical ruling that individuals who cannot work while out on multi-month leave are not qualified employees under the ADA.<sup>85</sup> Per EEOC guidance and other circuit courts' reasoning, whether or not an employee is "qualified" should be analyzed at the time that the em-

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<sup>81</sup> *Id.* The *per se* rule in *Severson II* leaves no room for consideration of the plaintiff's unique circumstances. *Recent Case: Employment Law*, *supra* note 5, at 2470; *see also Severson II*, 872 F.3d at 481 (holding that a multi-month leave of absence can never be a reasonable accommodation and therefore it is unnecessary to even consider the facts of *Severson*'s case). Even the Tenth Circuit Court of Appeals, which also stated in its 2014 opinion, in *Hwang v. Kansas State University*, that an individual who needs extensive leave is not "otherwise qualified," left some room for factual inquiry into the circumstances of the case. 753 F.3d 1159, 1162 (10th Cir. 2014) ("[T]aking extensive time off work may be more problematic, say, for a medical professional who must be accessible in an emergency than for a tax preparer who's just survived April 15.").

<sup>82</sup> *See Severson v. Heartland Woodcraft, Inc. (Severson II)*, 872 F.3d 476, 481 (7th Cir. 2017), *cert. denied*, 138 S. Ct. 1441 (2018) (holding that a multi-month leave of absence can never be a reasonable accommodation); H.R. REP. NO. 101-485, pt. 2, at 69 (1990) (stating that a reasonable accommodation should be tailored to the individualized circumstances of the particular employee and employer); *Recent Case: Employment Law*, *supra* note 5, at 2470 (positing that the Seventh Circuit Court of Appeals in *Severson II* "should not have foreclosed consideration of the plaintiff's individual circumstances").

<sup>83</sup> *See infra* notes 85–90 and accompanying text.

<sup>84</sup> *See infra* notes 91–102 and accompanying text.

<sup>85</sup> *Severson II*, 872 F.3d at 481.

ployee is set to return to work, not during the time they will be absent.<sup>86</sup> A qualified individual under the ADA is someone who, *with or without reasonable accommodation*, can perform the essential functions of the job.<sup>87</sup> Under this reasoning, many circuits have held that an employee who requests indefinite leave without a return date has not shown that they are qualified because there is no evidence that they will be able to resume the essential functions of their position when and if they return to work.<sup>88</sup> As long as a leave request is time limited, definite, likely to allow the employee to engage in the essential functions of the position upon return, and adequately communicated to the employer, however, the employee remains qualified under the ADA.<sup>89</sup> The Seventh Circuit should have engaged in factual inquiry into whether Raymond Severson's request for a leave extension—made two weeks in advance of surgery and estimated to last two to three months—met these standards.<sup>90</sup>

### *B. Per Se Rules Do Not Belong in ADA Litigation*

If the Seventh Circuit had determined that Severson's request was clear and time-limited and he was therefore a "qualified individual," it then would have had to consider whether the requested leave was reasonable under the

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<sup>86</sup> *Nunes v. Wal-Mart Stores, Inc.*, 164 F.3d 1243, 1247 (9th Cir. 1999); Brief of the EEOC, *supra* note 6, at 11–12. The Ninth Circuit Court of Appeals held in 1999, in *Nunes v. Wal-Mart Stores, Inc.*, that, in interpreting the "qualified individual" requirement, it is inappropriate to focus on the plaintiff's disability during the period of the medical leave. 164 F.3d at 1247. The EEOC stated that although the "qualified" analysis is typically considered at the time of the adverse employment action, when the requested accommodation is not one that can be immediately fulfilled the analysis should be whether or not the employee is qualified upon provision of the accommodation. Brief of the EEOC, *supra* note 6, at 11–12. For example, it would be inappropriate to find an employee not qualified at the present moment if it will take the employer a month to properly modify existing facilities, an accommodation specifically required under the ADA; rather, whether or not such an employee is qualified should be analyzed as of the time the modifications are enacted. *Id.* at 11.

<sup>87</sup> 42 U.S.C. § 12111(8) (2012) (emphasis added).

<sup>88</sup> *See, e.g., Santandreu v. Miami Dade County*, 513 Fed. App'x 902, 906 (11th Cir. 2013) (holding that, because plaintiff had already taken 15 months of leave and still was not able to provide a definite date of return to work, he did not meet his burden of proving that he would be able to perform the essential functions of the job in the future and therefore was not "qualified").

<sup>89</sup> Brief of the EEOC, *supra* note 6, at 21–22.

<sup>90</sup> *Id.* at 22; *see Severson II*, 872 F.3d at 479 (establishing a *per se* exclusion of multi-month leaves of absence from qualification as a reasonable accommodation rather than inquiring into the facts of Severson's case). The EEOC pointed out that the estimation by Severson's doctor turned out to be true, and that Severson was cleared to return to work three months and a few days after his surgery. Brief of the EEOC, *supra* note 6, at 22. Even Severson, however, conceded that it was unlikely he would be able to do the heavy lifting required of his position for some time even after returning to work. *Recent Case: Employment Law*, *supra* note 5, at 2470; *Severson v. Heartland Woodcraft, Inc. (Severson I)*, 2015 WL 7113390, at \*9–10 (E. D. Wis. Nov. 12, 2015), *aff'd*, *Severson II*, 872 F.3d 476, *cert. denied*, 138 S. Ct. 1441.

ADA.<sup>91</sup> The court's ruling went against the purpose of the ADA in creating a bright-line rule that a multi-month leave of absence is *never* a reasonable accommodation.<sup>92</sup> Accommodations under the ADA should be tailored to the individual employee and employer, leaving room for case by case inquiry when it comes to the specific facts of a leave of absence case.<sup>93</sup>

The foundation of the ADA is a belief that employees with disabilities should not be subject to generalized beliefs about their capabilities.<sup>94</sup> Congress recognized that implementing accommodations and removing obstacles to successful employment is an individualized process that may be confusing for

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<sup>91</sup> See *Echevarria v. AstraZeneca Pharm. LP*, 856 F.3d 119, 127 (1st Cir. 2017) (stating that if the plaintiff is otherwise qualified for the position, she then has the burden of showing that there is a reasonable accommodation that would allow her to perform the essential functions of the job and would be feasible for the employer); *Severson II*, 872 F.3d at 479 (holding that an individual who cannot work for an extended period of time is not a qualified individual and therefore a multi-month leave of absence is not a reasonable accommodation).

<sup>92</sup> *Recent Case: Employment Law*, *supra* note 5, at 2470 (although the Seventh Circuit made future leave-of-absence litigation highly predictable, it left no room for individual consideration of the plaintiff's circumstances); see *Severson II*, 872 F.3d at 481 (stating that a multi-month leave of absence excuses not working and therefore is never a reasonable accommodation that allows an employee to fulfill the essential functions of their job). Many cases highlight the importance of individualized inquiries and strike down blanket policies or exclusions implemented by employers. See, e.g., *EEOC v. Dollar Gen. Corp.*, 252 F. Supp. 2d 277, 291–92 (M.D.N.C. 2003) (clarifying that a reasonable accommodation inquiry should be made on an individualized, case-by-case basis). For example, the Sixth Circuit Court of Appeals held in 1999, in *Holiday v. Chattanooga*, held that, in making employment decisions, an employer cannot make blanket assumptions about whether someone with a particular condition is able to perform a certain job. 206 F.3d 637, 643 (6th Cir. 1999). Doing so focuses only on beliefs about the particular disorder and not on the individual employee and is contrary to the purposes and mandates of the ADA. *Id.* at 644 (citing *Taylor v. Pathmark Stores, Inc.*, 177 F.3d 180, 193 (3d Cir. 1999)). The D.C. Circuit Court held in its 2014 opinion, in *Solomon v. Vilsack*, that, when it comes to reasonable accommodations, the “demands of an employment position and the capacities of a workplace can vary materially from employer to employer” and therefore it is unusual that any accommodation will be found categorically unreasonable. 763 F.3d 1, 9–10 (D.C. Cir. 2014).

<sup>93</sup> See Colleen Coveney, *Assessing Leave of Absence Accommodations Under ADA*, LAW360 (Jan. 24, 2018, 11:05 AM), <https://www.law360.com/articles/1004889/assessing-leave-of-absence-accommodations-under-ada> [<https://perma.cc/NWQ5-G6VA>] (stating that ambiguity around concepts such as reasonable accommodation ensures case-by-case inquiry rather than categorical disposition of ADA cases). Even in *Severson II*, the Seventh Circuit stated that reasonable accommodation is a flexible concept that can include much more than the examples provided in the law. 872 F.3d at 481. The ADA's implementing regulations state that the employer should “initiate an informal, interactive process” to determine what accommodation is appropriate for the particular employee, and the legislative intent behind the law shows that reasonable accommodation inquiries are meant to be individualized. See 29 C.F.R. § 1630.2(o)(3) (stating that an interactive process should identify the limitations facing the employee and potential accommodations that will allow them to overcome those limitations); H.R. REP. NO. 101-485, pt. 2, at 69 (“by its very nature, an accommodation should respond to particular individual's needs in relation to performance of a specific job at a specific location”). The Supreme Court stated in its 1999 opinion, in *Sutton v. United Air Lines, Inc.*, that individuals with disabilities should be treated as individuals rather than “as members of a group having similar impairments.” 527 U.S. 471, 483–84 (1999).

<sup>94</sup> H.R. REP. NO. 101-485, pt. 2, at 58.



employers.<sup>95</sup> This does not alleviate employers' duty, however, to engage in an individualized inquiry into every request for an accommodation, and the Seventh Circuit should have engaged in factual inquiry when it came to determining whether the leave of absence request in *Severson II* was reasonable.<sup>96</sup> The court's refusal to do so will leave some employees with disabilities subject to the discriminatory practices Congress sought to protect them from.<sup>97</sup>

Further, the Seventh Circuit's holding is contrary to the Supreme Court's guidance from its 2002 opinion in *U.S. Airways v. Barnett* regarding reasonable accommodations.<sup>98</sup> Under the Supreme Court's two-step inquiry, a multi-month leave of absence may be presumptively unreasonable in the Seventh Circuit, but there would be an opportunity for plaintiffs to show that the special circumstances of their case make the request reasonable.<sup>99</sup> The employer would furthermore still have an opportunity to show that the request would cause undue hardship.<sup>100</sup> Allowing for consideration of special circumstances while creating presumptions against certain accommodations would balance employers' desire for predictability with employees' right to individualized assessment under the ADA.<sup>101</sup> Maintaining an opportunity for this flexibility would be more in line with EEOC guidance on the issue, the case-by-case

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<sup>95</sup> *Id.* at 74.

<sup>96</sup> *See id.* at 58 (“[C]overed entities are required to make employment decisions based on facts applicable to individual applicants or employees.”). Congress intended for inquiry into whether an accommodation is reasonable to be individualized and determined on a case-by-case basis. *Id.* at 62.

<sup>97</sup> *See* 42 U.S.C. § 12101. The findings and purposes of the ADA include the fact that individuals with disabilities face various forms of discrimination, including failure of employers to make modifications to existing policies. *Id.* § 12101(5). The ADA was implemented to combat the economic and vocational disadvantages facing individuals with disabilities. *Id.* § 12101(6). Individuals with disabilities are supposed to be treated as just that—individuals—rather than as a group, and making a *per se* rule subjects an entire class of people to identical treatment. *See Sutton*, 527 U.S. at 483–84 (stating that employees with disabilities should not be simply looked at as similar members of a common group but as individuals with unique needs); Blue, *supra* note 3333, at 23 (positing that the ADA requires employees to be amenable to changing standard practices in response to disabled employees' individual needs).

<sup>98</sup> *See U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 406 (2002) (holding that an employee is entitled to an opportunity to show that the specific facts of their case make an accommodation reasonable even if ordinarily it would not be); *Severson II*, 872 F.3d at 481 (holding without any consideration into the facts of the case that a multi-month leave of absence is not a reasonable accommodation); *Recent Case: Employment Law*, *supra* note 5, at 2469 (stating that under *Barnett*, courts are “encouraged to draw presumptive lines” not to make bright-line rules, and the *Severson II* court should have followed suit).

<sup>99</sup> *Recent Case, Employment Law*, *supra* note 5, at 2469; *see Barnett*, 535 U.S. at 405 (holding that plaintiffs retain an opportunity to prove that special circumstances warrant a finding that a certain accommodation is reasonable even if it typically would not be); *Severson II*, 872 F.3d at 481 (stating that multi-month leaves of absence are unreasonable because they excuse not working rather facilitate successful work).

<sup>100</sup> *Barnett*, 535 U.S. at 401, 402.

<sup>101</sup> *Recent Case, Employment Law*, *supra* note 5, at 2469.

approach taken by the Seventh Circuit's sister circuits, and the purpose of the ADA.<sup>102</sup>

## CONCLUSION

The ADA is not the place for bright line rules that certain accommodations can *never* be reasonable. Congress created the law to promote the idea that individuals ought to be judged on the basis of their actual abilities, not on generalized ideas about what they can and cannot do. Given that intent, the Seventh Circuit inappropriately held that an employee who requires a multi-month medical leave of absence is categorically not a "qualified individual." Doing so excludes an entire group of employees from employment and protection under the ADA without any consideration of the circumstances of the employee, employer, or leave request. Employees who request a lengthy but time-limited amount of leave that is likely to allow them to return to work at its conclusion should be considered qualified individuals and the court then needs to consider whether the requested leave is reasonable. Rather than creating a bright-line rule, the Seventh Circuit should have engaged in the Supreme Court's two-part inquiry into whether or not an accommodation is reasonable: first, examine whether or not extended medical leave is reasonable in the run of cases, and if not, make a factual inquiry into whether or not the particular leave can still be reasonable given the circumstances of the case.

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<sup>102</sup> See *Golden v. Indianapolis Hous. Agency*, 698 F. App'x 835, 837 (7th Cir. 2017) (Rovner, J., concurring) (stating that the ADA is meant to be "flexible and individualized" and requires factual determinations of undue hardship and reasonableness of accommodations rather than bright-line rules); *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 652 (1st Cir. 2000) ("it is wrong to say categorically that leave *can never* be a reasonable accommodation"); *EEOC v. Prevo's Family Mkt., Inc.*, 135 F.3d 1089, 1097 (6th Cir. 1998) (stating that the purpose of the ADA is "to prohibit employers from making adverse employment decisions based on stereotypes and generalizations associated with the individual's disability rather than on the individual's actual characteristics"); H.R. REP. NO.101-485, pt. 2, at 69 (stating that accommodations are meant to reflect both individual needs and the requirements of the specific job); U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 68, at 2 (highlighting that the reasonable accommodation requirement means that employers must *change the way things are customarily done* to provide access to employment for individuals with disabilities); see also *Coveney*, *supra* note 93 ("[T]he question of whether leave of a particular duration would pose an undue hardship is a separate inquiry and will always depend on the particular circumstances and the employer's resources.").